82-613

No. ———

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In The

Supreme Court of the United States

October Term, 1982

NORMAN PERL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit erred in dismissing Petitioner's intermediate appeal from a trial court order denying a motion for a hearing on prosecutorial misconduct when the principal witnesses would be the prosecutor and the petitioner, defendant in the trial court.

2. Whether the United States Court of Appeals for the Eight Circuit erred in dismissing an intermediate appeal from an order denying a motion to dismiss an indictment on the basis of prosecutorial misconduct.

TABLE OF CONTENTS

	Page
Statement of Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting This Petition:	
I. The Supreme Court has held that certain rulings in criminal cases are subject to intermediate appeal	4
II. The conflicting rulings among the various Circuits warrant review by this Court of the appealability of a pre-trial Order denying motion to dismiss for prosecutorial misconduct	5
III. The right to a hearing is inherent in any pre-trial resolution of claims of prosecutorial misconduct	9
IV. The conflicting rules among the various Circuits as to the proper procedure for resolution of claims of prosecutorial misconduct warrant hearing by this Court	10
Conclusion	12
Certificate of Service	13

APPENDIX INDEX

Opinion of the District Court, August 26, 1982 .....A-1
Order of Court of Appeals, September 3, 1982 .....A-17
Order of Court of Appeals Denying Re-hearing, September 23, 1982 .....A-19

TABLE OF AUTHORITIES

Cases:

Abney v. United States, 431 U.S. 651 (1977) 5
Austin v. United States, 297 F.2d 356 (4th Cir. 1961) 10
Blackledge v. Perry, 417 U.S. 21 (1974) 10
Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788 (DC Cir. 1937), *rev. for mootness*, 302 U.S. 658 9
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 545 5
Costello v. United States, 350 U.S. 359 (1956) 10
Helstoski v. Meanor, 442 U.S. 500 (1979) 5
Jackson v. Denno, 378 U.S. 368 (1964) 9
Massey v. Moore, 385 U.S. 105 (1954) 9
United States v. Brizendine, 659 F.2d 215 (DC Cir. 1981) 8
United States v. Calandra, 413 U.S. 338, 344 (1974) 10
United States v. Grabinski, 674 F.2d 677 (8th Cir. 1982) 8
United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981) 6
United States v. Griffin, 617 F.2d 1342 (9th Cir. 1980) *cert. den.* 449 U.S. 863 5
United States v. Litman, 661 F.2d 17 (3rd Cir. 1981) *cert. den.*, 102 S.Ct. 1016, 1447 6
United States v. Rosario, 677 F.2d 614 (7th Cir. 1982) 8

United States v. Serubo, 605 F.2d 807 (3rd Cir. 1979) 9
United States v. Serubo, 604 F.2d 807, 816 (1979) .. 10
United States v. Short, 671 F.2d 178 (6th Cir. 1981), *cert. den.*, 102 S.Ct. 2932 7

Statutes:

28 U.S.C. §1291 2

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NORMAN PERL,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Norman Perl, the Petitioner herein, prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Eighth Circuit as entered in the above-entitled matter on September 3, 1982; and the order of the Eighth Circuit denying Petitioner Norman Perl's petition for re-hearing en banc entered on September 23, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as United States v. Norman

Perl, —— F.2d —— (8th Cir. 1982). A copy of the Eighth Circuit's opinion has been included in the Appendix (Appendix B at page A-17). The Eighth Circuit denied Petitioner Norman Perl's Petition for Re-Hearing En-Banc, without opinion, on September 23, 1982. A copy of the Eighth Circuit order has been included in the Appendix (B at page A-17). The United States District Court for the District of Minnesota denied Petitioner's motion for an evidentiary hearing on the alleged prosecutorial misconduct and denied Petitioner's motion to dismiss the indictment because of prosecutorial misconduct. The order of the United States District Court for the District of Minnesota has been included in the Appendix (A at page A-1).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit filed its order on September 3, 1982 (B at page A-17). The Eighth Circuit denied Petitioner's motion for re-hearing en banc on September 23, 1982 (C at page A-19). The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1) of the United States Code.

STATUTE INVOLVED

The statute involved in the present case is Title 28, United States Code, Section 1291.

That statute, 28 U.S.C Section 1291 provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On February 23, 1982, Petitioner Perl brought civil action for injunctive relief before the United States District Court, District of Minnesota, Fourth Division, to enjoin Assistant United States Attorney Richard Vosepka from appearing before, presenting evidence to, or in any manner assisting United States Grand Jury conducting an investigation into Mr. Perl and others; and the basis for that complaint for injunctive relief was the allegation of Mr. Vosepka's misconduct which had prejudiced the Grand Jury.

The United States District Court denied that motion but sealed the indictment pending review by the Court of Appeals.

The Court of Appeals for the Eighth Circuit on March 5, 1982 issued an order remanding the matter to the United States District Court but stating the following:

> Although petitioners' claims on their face involve potential misconduct, the District Court is a proper initial forum for such factfinding. The petitioners remain free to raise the claims made here by way of motion to quash the indictment or other appropriate proceedings in the District Court.

Following remand from the Court of Appeals, the United States District Court arraigned petitioner Perl and the co-defendants in March, 1982.

Petitioner Perl filed timely motion to dismiss the indictment on the ground of prosecutorial misconduct. The principal witnesses would be the prosecutor for examination as to his conduct before the United States Grand Jury and Petitioner Perl for the presentation of the evi-

dence which he had documented and was prepared to present in writing and orally before the United States Grand Jury but was foreclosed from doing so by the prosecutor. The documents, relevant transcripts, and affidavits were filed in the District Court in support of the motion to dismiss for prosecutorial misconduct.

The District Court, see Appendix A, p. A-15, on August 26, 1982 denied the motion for an evidentiary hearing to establish the factual predicate for the motion to dismiss for prosecutorial misconduct; and the District Court denied the motion to dismiss the indictment, which motion had been based upon the allegation of prosecutorial misconduct.

The Court of Appeals, Appendix B, p. A-17, on September 3, 1982 dismissed the District Court order denying the motion to dismiss for prosecutorial misconduct as an interlocutory order. The Court of Appeals on September 23, 1982, Appendix C, denied the motion for re-hearing *en banc*.

The Court of Appeals and Circuit Justice Blackmun denied Petitioner's motions for a stay of the trial, and the trial commenced on September 7, 1982 and will continue for several months.

REASONS FOR GRANTING THIS WRIT

I.

The Supreme Court has held that certain rulings in criminal cases are subject to intermediate appeal.

A pre-trial order denying a motion to dismiss an indictment on double jeopardy grounds is a complete, formal, and final rejection of that double jeopardy claim.

It is collateral to and separable from the principal issue of the accused's impending criminal trial. It is therefore appealable. The elements of the claim are completely independent of guilt or innocence. *Abney v. United States*, 431 U.S. 651 (1977). A member of Congress has right to an intermediate appeal from the Order denying a motion to dismiss an indictment on the ground that it violates this Speech or Debate Clause of the Constitution. *Helstoski v. Meanor*, 442 U.S. 500 (1979). These rulings relied on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 545.

II.

The conflicting rulings among the various Circuits warrant review by this Court of the appealability of a pre-trial Order denying motion to dismiss for prosecutorial misconduct.

The Court should exercise its discretion in granting *certiorari* in the present case because of the importance of determining the proper pre-trial procedure on a motion to dismiss for proscutorial misconduct. The Courts of Appeals for the various circuits have ruled on this matter in various ways. The principal decisions touching on this problem are as follows:

Ninth Circuit. In *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980), *cert. den.* 449 U.S. 863, Griffin was indicted for embezzlement. The Ninth Circuit held that the denial of the motion is a complete and final determination of the vindictive prosecution claim; all the facts relevant to the claim would be known before trial; the claim is collateral to the issue of guilt or innocence of the accused. 617 F.2d 1345.

The District Court's Order in the present case demonstrates that there are two critical witnesses, neither one of whom may be guaranteed to testify at trial. One is the prosecutor, and the other is petitioner. Furthermore, that Order demonstrates the abuse of witnesses who may not testify, that is co-defendants, and the use of exhibits which may never be offered in evidence. Further, the treatment of this petitioner in his voluntary appearance before the Grand Jury was so atrocious as to result in hostility, barring him from presenting testimony about the credibility of critical government witnesses.

Third Circuit. In *United States v. Litman*, 661 F.2d 17 (3rd Cir. 1981), *cert. den.* 102 S. Ct. 1016, 1447 the trial court denied a motion to dismiss for prejudice resulting from the Grand Jury violation of the rule of secrecy. The Court of Appeals said:

> Denial of a motion to dismiss an indictment is a collateral Order which may not be appealed unless the Order has conclusively determined the claim, has resolved an issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment because the right at issue would be irreparably lost were the case to proceed to trial. 661 F.2d 18.

Fifth Circuit. In *United States v. Gregory*, 656 F.2d 1132 (5th Cir. 1981), the Court of Appeals dismissed the intermediate appeal. The Court restricted its ruling and pointed out that an immediate appeal is appropriate when that is the only way to protect a unique right. 656 F.2d 1134. The allegation with regard to prosecutorial vindictiveness was that the prosecutor was "after" the defendants. The lower Court was affirmed for denying a

hearing where the allegations were "mere conclusory" allegations of vindictiveness. The Court specifically stated that some vindictiveness claims might be destroyed if appeal were delayed. The example there was a prosecution for reasons unrelated to enforcement of the law. 656 F.2d at 1156. That touches close to the present case, where petitioner's right will be irretrievably lost for failure to have an evidentiary hearing, for at trial the exhibits may not be offered, the transcripts of petitioner's Grand jury testimony may not be offered, the prosecutor will not testify, and petitioner need not testify. Thus, the right against prosecutorial vindictiveness has been irretrievably lost by the denial of the motion.

Sixth Circuit. In *United States v. Short*, 671 F.2d 178 (6th Cir. 1981), *cert. den.* 102 S.Ct. 2932, the accused alleged prosecutorial misconduct because of misrepresentations as to whether he was a target when he appeared before the Grand Jury. The District Court reviewed the transcripts and found no misconduct. There was an intermiate appeal, and the Court of Appeals for that Circuit said that some authorities hold that misconduct may not be raised as part of a pre-trial appeal. It added:

> Absent compelling circumstances which would prevent meaningful review following trial, the strong policy of this Court against piece-meal review leads to the conclusion that ordinarily a claim of prosecutorial misconduct is reviewable only after trial. However, the District court made a specific finding on the issue, and forwarded the Grand Jury transcript to this Court under seal. Since we have the entire record before us on the Government's appeal, and a clear ruling by the District Court on the issue, judicial economy will be served by deciding it at this time. 671 F.2d at 188.

The Court after holding the issue appealable affirmed the lower court on that issue.

Seventh Circuit. In *United States v. Rosario*, 677 F. 2d 614 (7th Cir. 1982), the accused there actually had an evidentiary hearing, unlike the present case, and the Court of Appeals ruled that the Order denying the motion to dismiss was not appealable. The Court relied on the assumption that the accused could vindicate the rights against misconduct on appeal after conviction.

Eighth Circuit. In *United States v. Grabinski*, 674 F. 2d 677 (8th Cir. 1982), the sketchy motion to dismiss asserted prosecutorial vindictiveness after he had successfully changed venue on earlier charges was held inadequate for dismissal in the District Court. The Court of Appeals for the Eighth Circuit held that it was not subject to intermediate appeal. Circuit Judge Heaney concurred only with respect to the result on that issue, and three Circuit Judges dissented. Chief Judge Lay said that the Order was a final disposition of the issue and not an element of the merits. Chief Judge Lay in his dissent said:

> Even if a conviction is subsequently reversed, the anxiety produced by the increased risk involved in standing trial on the new charges and the added expense and difficulty of defending against the charges would deter defendants from utilizing procedural rights. 674 F.2d 683.

That seems to be the prologue to this petitioner, who would not voluntarily testify in a Grand Jury as a target defendant if he had known the type of treatment that he actually did receive.

DC Circuit In *United States v. Brizendine*, 659 F.2d 215 (DC Cir. 1981), the motion to dismiss was issued in

reliance upon the absence of a controlling Supreme Court precedent. 659 F.2d 220. The misconduct there revolved around assertions of the plea bargaining process. For lack of controlling precedent, the Court held that there was no intermediate appeal right.

None of the cases precisely relating to the appealability of a vindictiveness ruling against the accused involves the detailed evidence of misconduct with the finality to such an extent as we have in the present petition. The reason for that is that the documents in the present case and the two critical witnesses, the petitioner and the prosecutor, need not even testify at the trial. Thus, it is absolutely critical that an evidentiary hearing be accorded to petitioner.

III.

The right to a hearing is inherent in any pre-trial resolution of claims of prosecutorial misconduct.

It would appear that an evidentiary hearing is not dependent upon a specific statute or rule for the resolution of a factual dispute. See *Clarksburg-Columbus Short Route Bridge Co. v. Woodring*, 89 F.2d 788 (DC Cir. 1937), *rev. for mootness*, 302 U.S. 658. Adequate resolution of the issue of a coerced confession depended upon an evidentiary hearing. *Jackson v. Denno*, 378 U.S. 368 (1964). Mental competence at the time of trial requires an adequate hearing outside of the jury's presence. *Massey v. Moore*, 385 U.S. 105 (1954). Adequate trial of prosecutorial misconduct depends upon adequate discovery. *United States v. Serubo*, 605 F.2d 807 (3rd Cir. 1979). When loss of rights under the constituion has been adequately alleged, a hearing is required; the Court

should enter findings of fact and conclusions of law. *Austin v. United States*, 297 F.2d 356 (4th Cir. 1961).

Petitioner has not been accorded any evidentiary hearing. On the strong showing made, under oath, it is inconceivable that due process of law can be accorded to petitioner without an adverse, evidentiary hearing on issues which undoubtedly will never be resolved at trial.

IV.

The conflicting rules among the various Circuits as to the proper procedure for resolution of claims of prosecutorial misconduct warrant hearing by this Court.

The Court should consider proceedings in the District Court because of the importance of determining the proper pre-trial procedure on a motion to dismiss for prosecutorial misconduct. To the extent that the misconduct affects the Grand Jury proceedings, petitioner's right to consideration by an unbiased Grand Jury, as guaranteed by the Fifth Amendment, is violated. *Costello v. United States*, 350 U.S. 359 (1956). Prosecutorial misconduct may infect the Grand Jury proceedings. *United States v. Serubo*, 604 F.2d 807, 816 (1979). Opportunities for vindictiveness may deprive an accused of due process of law. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). The proceedings in the District Court involve an arbitrary exclusion of much information. This Court has held that a Grand Jury investigation is not fully completed until all available clues have been run down and all witnesses examined "in every proper way." *United States v. Calandra*, 413 U.S. 338, 344 (1974).

Petitioner if accorded opportunity to present argument will propose that the Court resolve the conflicts among the Circuits with respect to the procedural devices available for the resolution of claims of prosecutorial misconduct.

Petitioner will propose the following types of procedural advices:

1. *Conclusive evidence of misconduct.* Certain activities by the prosecutor would necessarily result in proof of misconduct that however explained would not save charges. A *per se* misconduct would leave nothing to evaluate as a matter of law. See *Jackson v. Walker*, 585 F.2d 139, 148 (1978).

2. *A prima facie case of misconduct.* Certain cases involve allegations of severe importance but may be explainable. The procedure should be established to have the trial court declare a *prima facie* case made by the accused with a transfer of either the burden of proof or risk of non-pursuasion to the Government to exonerate itself of the *prima facie* case.

3. *Full evidentiary hearing.* Certain cases involve less than the specificity involved in the present case and may warrant a full evidentiary hearing with the burden remaining on the accused.

CONCLUSION

The unique nature of a motion to dismiss an indictment on the basis of a detailed allegation of prosecutorial misconduct mandate that specific pre-trial procedures be established by this Court in order that all Circuits have guidance as to a resolution of the evidentiary disputes and resolution of the defendant's rights for hearing. This litigation presents the Court with the proper factual predicate to determine the right to an evidentiary hearing and the placement of the burden of proof, depending upon the weight of the evidence as evaluated by this Court. An evidentiary hearing is almost synonomous with due process of law. A conviction following a trial which proceeds without the adversary, evidentiary hearing would have to be set aside. Pre-trial procedures should be established by the Court by the granting of this writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As one of the attorneys for the Petitioner herein, I do hereby certify that pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, I caused three copies of the Petitioner's Petition for a Writ of Certiorari to be served upon the following:

Richard Vosepka
Assistant United States Attorney
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by United States Mail, postage prepaid, on this 1st day of October, 1982.

/s/ Patrick J. Foley
(Original signed by Patrick J. Foley)

APPENDIX A

In the United States District Court
For The District Of Minnesota
Third Division

United States of America,

Plaintiff,

vs.

Norman Perl, Willard F. Browne, Jerome R. Johnson, Orville E. Heil, and Robert P. Olson,

Defendants.

No. CR 3-82-32

Order

This matter comes before the Court pursuant to defendant Norman Perl's motion to stay this Court's order of August 6, 1982 setting this matter for trial on Tuesday, September 7, 1982 at 1:30 p.m. An identical motion was filed in the related civil case.[1] Based on the extensive briefs of counsel plus extensive pleadings, exhibits, all the transcripts of the grand jury, a written offer of proof received from the defendant Perl on August 23, 1982, and two live hearings, which included most, if not all. of these same issues and arguments, the Court denies the motion for a stay and denies the motion to dismiss for prosecutorial misconduct.

[1] *DeParcq, Anderson, Perl, Hunegs & Rudquist and Norman Perl v. Richard Vosepka*, No. 3-82-161.

Based upon matters that occurred before the grand jury during the testimony of defendant Perl (and other defendants who asserted their Fifth Amendment privilege to remain silent) and alleged misconduct by postal inspectors, the defense has collectively urged a motion to dismiss this indictment for "prosecutorial" misconduct. In connection with this motion, the defense has also moved for copies of the entire grand jury proceedings. The defense has further requested an evidentiary hearing on this motion.

The Court ordered the United States to produce transcripts of the entire grand jury proceedings for in camera inspection. The Court has now read all of these transcripts and has them fully in mind. Although it was envisioned that an evidentiary hearing on the motion to dismiss would be conducted on September 2-3, 1982, counsel for defendant Perl urged indicated that a hearing of this duration would be wholly inadequate. Counsel has recently informed the Court that they intend to call as many as 38 witnesses at the evidentiary hearing and that the hearing would take two weeks.

This Court, in order to get to the crux of the situation, ordered the defendant Perl to submit a list of all witnesses, together with a synopsis of their testimony, in camera, that would be called to testify at the requested evidentiary hearing. Counsel has not provided this information to the Court. By letter of August 20, 1982, counsel for defendant Perl referred to this information as an offer of proof, and the Court accepts it in that form. The Court, having reviewed this list of proposed witnesses, finds that most of this evidence has no real relationship to possible prosecutorial misconduct. This evidence is more aptly characterized as possible defense testimony. This proposed tes-

timony, for the most part, would be a rehash of the arguments already made concerning "prosecutorial" misconduct except for the offer of proof testimony of the chief prosecutor, Richard Vosepka. This evidence will be discussed, *infra*.

The Court did not envision ruling on this motion until after the hearing on September 3, 1982. However, counsel has informed the Court of their intention to seek relief from the Court of Appeals in the event that this request for an evidentiary hearing is denied. The grand jury transcripts, the extensive pleadings, the offer of proof, and two live hearings provide this Court with sufficient understanding of the thrust of the motion to rule on the entire matter at this time. The Court has, as requested by the defendants, decided to rule on the matter now so that the defendants may consider an appeal prior to trial.

The motion to dismiss for prosecutorial misconduct is based on several acts and omissions before the Grand Jury. First, the defendants object to several "gratuitous or insulting" remarks made by the prosecutor during the grand jury examination of Norman Perl. Next, defendant Perl argues that the prosecutor did not present exculpatory evidence to the grand jury, nor did he allow Perl to present such evidence to the grand jury. This allegation is the primary thrust of the offer of proof. The defendants further point to ABA Standards for Criminal Justice, the Prosecution Function §3.6(e), which forbids the compulsion of evidence from a "target" defendant without informing him that he is a target and giving him an opportunity to seek legal advice. This ethical canon also forbids the calling of a witness before the grand jury if the prosecutor knows in advance that the witness will assert

his Fifth Amendment privilege. Defendant Perl also contends that the prosecutor deliberately deceived the grand jury by allowing them to believe that Perl was involved in loans to Aetna employees. Perl also maintains that the prosecutor based his presentation to the grand jury on hearsay evidence.[9]

This Court, having served as a United States Attorney, does not take Justice Sutherland's words lightly.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definte sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

However, it is well settled that there is a strong presumption of regularity accorded to grand jury findings. A heavy burden is placed on one who seeks to overturn the presumption that an indictment returned by a legally con-

[9]Although this is not a complete list of the defendants' contentions, it is representative of the other assertions of prosecutorial misconduct.

stituted body is founded on competent evidence. *United States v. Boykin*, No. 81-1965 (8th Cir. 6/9/82); *United States v. West*, 549 F.2d 545 (8th Cir. 1977); *Beatrice Foods v. United States*, 312 F.2d 29 (8th Cir. 1963). Although the prosecutor has a duty not to inflame or otherwise improperly influence grand jurors against any person under criminal investigation, *United States v. Gold*, 470 F.Supp. 1336 (N.D.Ill. 1979), courts have repeatedly urged a sparing use of the courts' supervisory power over the grand jury. It has been said that the indictment should be dismissed only upon a showing of demonstrated and longstanding prosecutorial misconduct. *United States v. Nembhard*, 676 G.2d 193 (9th Cir. 1982); *United States v. Broward*, 594 F.2d 345 (2d Cir. 1979).[3] The Ninth Circuit has held that dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way as where perjured testimony has knowingly been presented. *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979).[4] It is under this heavy burden that the Court reviews the defendants' motion to dismiss for prosecutorial misconduct.

The defendants point out that it is the cumulative effect of the individual assertions of misconduct that they rely on in seeking to dismiss this indictment. The Court agrees that the grand jury proceeding should be viewed in its totality in determining whether to dismiss for prosecutorial misconduct. *United Statets v. Nembhard, supra; United States v. Samango, supra; Beatrice Foods v. United States, supra; United States v. Gold, supra.*

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[3]In *Nembhard* the Sixth Circuit could not say that the misconduct was either widespread or extraordinarily serious. On this basis, it was found to be an abuse of discretion to dismiss the indictment.

[4]The Ninth Circuit described the transcript of the grand jury proceedings in *Samango* as "an impressive repertory of insults and insinuations." *Samango* at p. 883.

There has been a considerable amount of case law dealing with the propriety of obtaining an indictment with evidence which would not be admissible at trial. It is clear that an indictment may be valid even though based entirely on hearsay. *See* Fed.R.Ev. 1101(d) (2); *United States v. Boykin, supra; United States v. Brown,* 573 F.2d 1274 (5th Cir. 1978); *United States v. Callahan.* 442 F.Supp. 1213 (D.Minn. 1978).[*]

The offer of proof in this matter is in part designed to show exculpatory evidence that the defendants believe was not presented to the grand jury. Defendant Perl has vigorously argued that he has a constitutional right to exculpate himself at the grand jury. His primary authority for this alleged constitutional right is a statement from *United States v. Calandra,* 414 U.S. 338 (1974), wherein the Court stated:

> A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.

Calandra, at p. 344. The Court believes that this citation to *Calandra* is not directly applicable here. In *Calandra,* the Court used the above statement to describe the grand jury's need for broad investigatory powers. To the contrary, it has been held many times that a defendant may not challenge an indictment on the ground that information which he considered favorable to his defense was not

[*]It has been held that the use of hearsay testimony may invalidate an indictment where nonhearsay testimony is readily available and there is a high probability that the grand jury would not have indicted if it had heard the eyewitness testimony. *United States v. Curz,* 478 F.2d 408 (5th Cir. 1973). No such argument was presented in this case.

presented to the grand jury, *United States v. Boykin, supra; United States v. Smith*, 552 F.2d 257 (8th Cir. 1977); *United States v. Smith*, 595 F.2d 1176 (9th Cir. 1979). *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975); *United States v. Samango*, supra.[6]

The defendants Heil, Olson and Johnson are investigators associated with defendant Perl's law firm. Each of these men were subpoenaed to the grand jury and each of them asserted their Fifth Amendment privilege against self incrimination.[7] As part of the motion to dismiss for prosecutorial misconduct, these defendants assert that the prosecutor knew of their intention to assert the Fifth Amendment privilege and therefore should not have called them to testify. Further, the defendants complain of the continued examination by the prosecutor after each defendant had asserted the Fifth Amendment right against self incrimination.

Specifically, the defendants complain of the prosecutor's treatment of Orville Heil on September 15, 1981. During Mr. Heil's brief testimony, he asserted his Fifth Amendment privilege when asked questions pertaining to the na-

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[6]This is not to suggest that the prosecutor owes no duty to present exculpatory evidence to the grand jury. See *United States v. Phillips Petroleum Co.* 435 F. Supp. 610 (N. D. Okla. 1977); *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). In *Phillips*, the Court held that a prosecutor's failure to present exculpatory testimony after advising the witness that his statements would be considered part of the grand jury records was an abuse that rendered the proceedings defective. In *Provenzano*, the prosecutor knew that the identifying witness in an eye-witness identification case had expressed doubts about the identification and this fact was not presented to the grand jury. As part of his duties under *Berger, supra*, the prosecutor should be held to a high standard of fairness at the grand jury. This high standard does not include the presentation of full adversarial trial before the grand jury.

[7]Defendant Orville Heil was subpoenaed to come before the grand jury on two occasions. On the first occasion, he was asked to testify. On the second occasion, he was asked to bring records and documents.

ture of his employment and the date of his birth. When Mr. Heil declined to answer the question as to the date of his birth, the prosecutor decided to take a break and said:

> I'd like to, first of all, consult with Mr. Heil's attorney for a moment, and then it might be necessary to talk to the district court.

(Transcript of grand jury proceedings September 15, 1981, p. 7) When he returned, Mr. Heil gave the date of his birth. When asked about his educational background, Mr. Heil again asserted his Fifth Amendment privilege. The prosecutor then stated: "If

> If we might take a brief recess again, because I think at this point we may go before the district court for a few moments . . .

(Transcript of grand jury proceedings September 15, 1981, p. 8.) The thrust of defendants' argument in this regard is that the prosecutor had thereby engaged in an adverse comment on the invocation of the Fifth Amendment privilege by inferring that he would get a court order to force Mr. Heil to testify.

The duty to testify has long been recognized as a basic obligation that every citizen owes his government, *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). The duty to testify may be burdensome and embarassing. It may cause injury to a witness's social and economic status. He is not entitled to challenge the authority of the grand jury or to set limits to the investigation that the grand jury may conduct. *United States v. Calandra*, *supra*, at p. 345.

A potential defendant may properly be subpoenaed to appear before a grand jury that is investigating his activities. "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete." *United States v. Mandujano*, 425 U.S. 564, 573 (1976). Although the Court found little authority on this point, it has been held that even where a grand jury witness asserted his Fifth Amendment privilege, it was not improper for the prosecutor to examine the witness along other lines of inquiry. *United States v. Cohen*, 444 F.Supp. 1314 (E.D. Pa. 1978).

On the basis of the foregoing authority, the Court does not believe that the prosecutor's actions, with respect to these defendants at the grand jury, are particularly important in assessing the merits of the motion to dismiss for prosecutorial misconduct. However, the Court does not necessarily condone these activities. Particularly, the Court believes that the prosecutor should not make statements suggesting that the Court will back him up on a moment's notice, especially where, as here, the Court refused to get involved with the grand jury proceedings.

In *United States v. Kaminski*, No. 81-1200 (8th Cir. 7.29.82), the prosecutor cross-examined a defense witness with the following question:

> Isn't it also true concerning your proposed testimony here, you strongly considered coming and taking the fifth amendment?

The Eighth Circuit Court of Appeals held that this, in addition, to other instances of alleged misconduct, did not

require the reversal of Kaminski's conviction.[8] The Court simply believes that the asserted error in this matter does not rise to the same level as the question asked by the prosecutor in *Kaminski*.

The Court would not that the defendants have transcripts of their own grand jury testimony. As earlier mentioned, the Court has additional grand jury transcripts that the defendants have not seen. In some of these transcripts, and particularly those entitled "Prosecutor Comments," the Court has found additional injudicious statements by the prosecutor. However, considering all such statements, known and unknown to the defendants, the Court finds that collectively they do not amount to "prosecutorial misconduct" sufficient to sustain the defendants' motion.[9]

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[8]In fairness to the defendants' position, it must be noted that the trial court gave a cautionary instruction to the jury after sustaining an objection to this question. The error was, therefore, "cured."

[9]The Court's conclusion with respect to the events described above should not be taken as though the Court subscribes to all of the prosecutor's actions or that the Court believes that this is a model indictment. The Court is particularly concerned about several gratuitous comments made by the prosecutor that do not fit into the standard described in *Berger, supra*. In one instance, Mr. Perl was testifying as to the members of his office involved in railroad litigation. He noted that a Mr. Eckman did try a couple of cases "He lost them both and ran up some pretty good expenses." The following colloquy between Mr. Perl and the prosecutor then insued:

Mr. Perl: I don't mean to be insulting but—

Mr. Vosepka: Of course, you do.

Mr. Perl: No, I really non't. . . .

Transcript of grand jury proceedings September 3, 1981 at p. 43. The Court cannot understand why the prosecutor would want to suggest that Mr. Perl was insulting Mr. Eckman, but in any event, the comment seems inappropriate and uncalled for.

In support of the motion to dismiss, the defendants have also offered the affidavit of Mary Ellen Quirk, a secretary/legal assitsant associated with Norman Perl for the past 21 years. In this affidavit, marked as Exhibit N, she states that "during my appearance before the United States Grand Jury, the Assistant United States Attorney, Mr. Vosepka, commented that Mr. Perl was represented by attorney Ron Meshbesher." Mr. Perl contends that this comment was intended to inform the jury that Mr. Perl was represented by a well-known defense attorney. Mr. Perl maintains that this is misconduct in that

Defendant Perl urges further misconduct in that his answers to questions were often cut off and he was limited to "yes" or "no" answers. The Eighth Circuit has warned prosecutors against placing excessive restrictions on a grand jury witness' testimony. In *United States v. Boberg*, 565 F.2d 1059 (8th Cir. 1977), the Court stated:

> We think that a grand jury witness, particularly one who may be the target of a prosecution, ought to be given a fair opportunity to respond fully to questions and not be limited to the "yes" or "no" that typifies answers to leading questions.

Mr. Perl was before the grand jury about five hours, much of which was a series of narrative statements by Mr. Perl. It is true that Mr. Perl was stopped on a few occasions; however, the Court believes that the prosecutor's restrictions on Mr. Perl's testimony were warranted in this case. First, Mr. Perl's answers to many questions tended to be somewhat nonresponsive to the questions. Second, if was often one of the grand jurors, as opposed to the prosecutor who cut off Mr. Perl's testimony or demanded a "yes" or "no" answer. In light of these factors, the Court cannot say that the method of his examination was unfair or improper.

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it allows the jury to draw the conclusion that since Mr. Perl believes that he needs a good lawyer, he therefore must be guilty.

In *United States v. Gold*, 470 F.Supp. 1336 (N.D.ILL. 1979), an indictment was dismissed for prosecutorial misconduct partially because of the prosecutor's comment with respect to a defendant's hiring a nationally recognized criminal defense law firm. The situation in *Gold* is distinguishable from that now before the Court. In *Gold*, it appears that the prosecutor made this comment without any reason whatsoever. Ms. Quirk was merely asked whether she had been given any advice by attorneys in the firm or for the firm prior to her testimony before the grand jury. There was not any adverse comment given to the hiring of an attorney by Mr. Perl. In fact Mr. Meshbesher was referred to as an attorney for the firm of DeParcq, Anderson. The Court concludes that the prosecutor had a right to ask the question in the manner that was chose.

The main thrust of the offer of proof appears to center on Mr. Perl's desire to call himself, the prosecutor, Mr. Vosepka, and the postal inspectors assigned to the case, Sterling McKusick and Harry Shields.

The offer of proof pertaining to Mr. Perl's proposed testimony covers matters that he now believes that he did not properly convey to the grand jury during the approximately five hours he spent in their presence.

The defendants would also like to cross-examine the prosecurot on 55 points that they believe he might have approached differently or did not bring to the attention of the grand jury.

The Court has read the comments of Vosepka and, as previously stated herein, finds that they were not such as would require dismissal of the indictment. This is especially true in light of the several occasions on which the prosecutor "bent over backwards" to be more than fair to the defendants. The Court's opinion is not changed by this offer of proof.

The offer of proof with respect to the postal inspectors is somewhat different. The defendants seek to show that these men have intimidated potential witnesses and otherwise conducted themselves inappropriately in the investigation of this matter. The Court does not know whether or how this relates to prosecutorial misconduct. In *Calandra supra*, the Supreme Court made it clear that evidence gained in violation of constitutional rights is admissible before the grand jury. Assuming that somehow this evidence would be relevant to the motion to dismiss, the Court does not believe that this evidence would add significantly to the defendants' presentation.

In conclusion, the Court has considered the briefs, the

transcripts, the offer of proof, the exhibits and the arguments presented at the hearings in this matter. Some of the allegations of misconduct are baseless and some have some amount of merit. Viewing the grand jury proceedings in their entirety, the Court simply cannot find that the defendants have met the heavy burden of establishing prosecutorial misconduct.

The Court is aware that the defendants would like to have an evidentiary hearing on the motion for prosecutorial misconduct. Defendants cite *United States v. Whitted*, 454 F.2d 642 (8th Cir. 1972), for the proposition that an evidentiary hearing must be held before trial or the Court will be precluded from dismissing the indictment at a later time. In *Whitted*, the Court had ordered the production, for in camera inspection, of the testimony of all witnesses before the grand jury whose testimony was relevant to the subject matter of the jury's investigation. The judge denied the motion to dismiss for prosecutorial misconduct before trial. The defendants were then convicted. The Court of Appeals held that the trial court lacked jurisdiction to dismiss the indictment after the jury returned the verdicts of guilty in light of the fact that no further testimony during trial had been elicited on the issue of prosecutorial misconduct and the court had not reserved urling on the motion.

The Court in *Whitted* stated in a footnore.

> 1. On July 1, 1970, some ten weeks before he overruled Whitted's motion to dismiss the indictment, the trial court had ordered the production, for in camera inspection, of the testimony of all witnesses before the grand jury whose testimony was relevant

> to the subject matter of the jury's investigation. We can only presume, therefore, that the trial court had studied this testimony at the time he made his September 18 ruling on the motion to dismiss the indictment. Furthermore, we find no indication that the trial court reserved ruling on the motion to dismiss in any manner.

Whitted, supra, at p. 643 (emphasis in original). This Court has no crystal ball, and it is possible that when all the evidence has been presented at trial, the motion for prosecutorial misconduct could have more validity than it has now.[30] It might be the better procedure to reserve ruling on said motion in the criminal trial. However, counsel for defendant Perl has repeated several times that he wants the Court to rule so that a prompt appeal can be taken from any possible adverse ruling.[31]

This is, as they all are, an important criminal case. These defendants are not entitled to a perfect grand jury any more than they are entitled to a perfect trial. This Court has carefully considered all of their allegations and found that they come up short. The time has come to try

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[30]Part of the defendants' motion asserts that the prosecutor deliberately deceived the grand jury as to the substance of particular transactions. This Court will have no way of knowing whether this is true until it has heard the evidence at trial.

[31]The Court has reservations about this attempted appeal. First, the Court does not believe that Judge Haney's order of March 5, 1982 mandated an evidentiary hearing in this case. Further, this Court's preliminary research causes it to believe that the ruling on the motion to dismiss for prosecutorial misconduct is not an appealable order, *see United States v. Rosario*, 677 F.2d 614 (7th Cir. 1982); *United States v. Gregory*, 50 L.W. 2225 (5th Cir. 9/25/81); *but see United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1981). In the event the Court of Appeals accepts this interlocutory appeal, the Court will provide the prosecution with a copy of the in camera offer of proof so that they may properly meet the testimony and issues contained therein. If, on the other hand, this ruling is not appealable, this Court might entertain a motion to reconsider and then reserve ruling on it.

this criminal case. It should not be delayed for two weeks while a "no holds barred" inquiry is made into the fairness of the preindictment procedures.

For all of the above reasons,

It Is Therefore Hereby Ordered:

1. That the defendants will not be given any grand jury transcripts that they do not already have.

2. There will not be an evidentiary hearing, either in the criminal case or in the companion civil case, and the offer of proof is hereby denied.

3. There will not be a stay in the criminal case.

4. The motion to dismiss for prosecutorial misconduct is hereby denied.

5. The final pretrial will be held as scheduled.

6. This criminal trial will commence as heretofore scheduled.

Dated this 26th day of August, 1982.

Donald E. O'Brien, Judge
United States District Court

APPENDIX B

United States Court of Appeals
For The Eighth Circuit

No. 82-2019

In Re: Norman Perl,

Petitioner.

* * *

No. 82-2040

DeParcq, Anderson, Perl, Hunegs & Rudquist, P.A. and Norman Perl,

Appellant,

v.

Richard Vosepka, Assistant United States Attorney,

Appellee.

* * *

No. 82-2041

United States of America,

Appellee,

v.

Norman Perl,

Appellant.

Petition For Writ Of Mandamus And Stay

Appeal from the United States District Court for the District of Minnesota

Petition for writ of mandamus filed in cause No. 82-2019 and application for stay have been considered by the

court and are hereby denied. Regarding the appeal in case No. 82-2040, the stay is denied; however, appellant may proceed on appeal with the underlying issue if he so desires.

It is further ordered that the appeal, No. 82-2041, is hereby ordered dismissed as being interlocutory; mandate to issue forthwith.

September 3, 1982.

APPENDIX C

United States Court of Appeals
For The Eighth Circuit

September Term 1982

No. 82-2019

In Re:

Norman Perl,

Petitioner.

No. 82-2041

United States of America,

Appellee,

vs.

Norman Perl,

Appellant.

Petition for Writ of Mandamus and Stay

Appeal from the United States District Court for the District Court of Minnesota

The Court, having considered petittioner/appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Lay did not participate in the consideration of this matter.

September 23, 1982